

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO. 477 OF 2020

APPELLANT: Liladhar s/o Harichandra Uike,
Aged about 29 years, Occu: Labour,
R/o Ganeshpur, Tah. Tumsar, District
Bhandara.

..V E R S U S..

RESPONDENTS 1] State of Maharashtra,
through P.S.O., Gobarwahi,
Tah. Tumsar, Dist. Bhandara.

2] XYZ (Victim) through Informant/
Complainant Vide Crime No. 125/2018.
Registered P.S.O. Gobarwahi,
Tah. Tumsar, District-Bhandara.

Mr Mahesh Rai, counsel for the appellant.
Ms Shamshi Haider, APP for the respondent No.1.
Ms M.Z. Haq, counsel (appointed) for the respondent No.2.

CORAM : ANIL S. KILOR, J.
DATE : 01st December, 2022

ORAL JUDGMENT :

1. Heard.

2. **ADMIT**

3. This appeal takes exception to the judgment and order
dated 02/11/2020 passed by the Special Judge at Bhandara in

Special (POCSO) Case No. 42/2018, convicting the appellant/accused as follows :-

Offence	Sentence
Section 376(3) of the Indian Penal Code and offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act')	Rigorous Imprisonment for ten years and payment of fine of Rs. 2,000/-, in default to suffer simple imprisonment for one month.

4. The case of the prosecution in short is that :- That, on 21/08/2018 at about 5.30 survivor returned home and started to cry by saying “सु लागली” (she felt urinating). The grandmother of the survivor looked at the private part of the survivor. She noticed blood stains at private part of the survivor. After inquiry, the survivor disclosed that Liladhar uncle gave her allurements of snacks, took her inside a stationary vehicle, and inserted his finger in her vagina and anus. She had pained therefore, she cried. Then accused threatened the survivor not to disclose the incident else, he will not give her snacks. The accused alighted her from the vehicle and left for home and the survivor returned home. After some time, the accused came towards their home, survivor pointed fingers towards him. The accused was frightened and returned to his home.

Thereafter, the grandmother of the survivor narrated this incident to his son Amol, nephew Puranlal and Jiyalal. The grandmother of the survivor with her nephew went to the house of the accused for asking about the incident. Thereupon, the accused felt sorry and told that “he committed the mistake, he will not repeat it” then survivor was shifted to Primary Health Center, Gobarwahi and then referred to Government Hospital, Tumsar and lastly at General Hospital, Bhandara.

5. Thereafter, the grandmother of the survivor reported the incident on 22/08/2018 at 23.45 hours and accordingly, the offence was registered. Thereupon, the investigation was made and charge-sheet was filed.

6. Then, the charge was framed vide Exhibit No.13 for the offence punishable under Section 376(3) of the Indian Penal Code and offence punishable under Section 6 of the POCSO Act against the accused.

7. The accused pleaded not guilty and accordingly trial was conducted.

8. The prosecution has examined eight witnesses to establish its case. The statement of the accused was recorded under

Section 313 of the Code of Criminal Procedure at Exhibit No.67.

The accused entered into the witness box and examined two witnesses in defence.

9. The defence of the accused is that he was working with Ziyalal Katre, and he refused to work with the father of the survivor. The informant is in habit of making a false allegations to extract money. The informant had quarrelled with the uncle of the accused and therefore as a counterblast, he has been falsely implicated in the alleged offence.

10. The learned trial Court after marshaling the oral as well as documentary evidence convicted the accused for the offence punishable under Section 376(3) of the Indian Penal Code and Section 6 of the POCSO Act and sentenced him to suffer rigorous imprisonment for ten years and with fine of Rs. 2,000/-, in default of payment of fine, to undergo rigorous imprisonment for one month.

11. I have heard Shri M.V.Rai, the learned counsel for the appellant, Ms Shamshi Haider, learned APP for the State/respondent No.1 and Ms M.Z. Haq, learned counsel for respondent No. 2/Victim.

12. The learned counsel for the appellant makes following submissions :-

- (a) The appellant has been falsely implicated in the alleged offence.
- (b) The doctor of the primary health center where the victim was examined first, was not examined by the prosecution and there is no final medical opinion that the rape was committed.
- (c) There are discrepancies in the oral testimony of the witnesses.
- (d) There is a delay in the lodgement of the FIR.
- (e) The learned trial Court has not considered the oral as well as documentary evidence in right perspective.

13. Per contra, the learned APP supports the impugned judgment and order and submits that, sufficient evidence was brought by the prosecution and the learned trial Court has rightly convicted the accused.

14. Learned counsel for the victim reiterates the submission of the learned APP and further submits that, there is no delay as the police received information on the same day. She further pointed out that, the medical evidence corroborates the ocular evidence of the victim.

15. In the backdrop of rival contentions of the respective parties, I have perused the record, impugned judgment and order, and the relevant authorities.

16. The PW-1 is the grandmother of the victim, who in her oral testimony has stated that the accused is her neighbor and friend of her nephew, who used to come to her home. She states that the incident occurred on 21/08/2018 at about 5.30 p.m. when the victim came home and while weeping she told to her “सु लागली”. She verified her private part and she noticed blood stains on her private part. When asked for reason, she narrated that the accused by giving allurements of “Khau” took her in the vehicle which was stationed outside and inserted his finger in her vagina and anus. The P.W. 1 further states that as the victim was having pain, so she started crying.

17. At this juncture, before examining the victim's evidence, it would be appropriate to reiterate the law on reliability of the evidence of child witness as the victim P.W. 3 was five years old on the date of the offence and on the date of recording of her evidence she was six years old.

18. The Hon'ble Supreme Court of India in the case of *State*

of *Karnataka Vs. Shantappa Madivalappa Galapuji and others*¹, has held thus:

“14. The position in law relating to the evidence of child witness has been dealt with by this Court in Nivrutti Pandurang Kokate v. State of Maharashtra and Golla Yelugu Govindu v. State of A.P.

15.... “6.... The Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Suryanarayana v. State of Karnataka)

7. In Dattu Ramrao Sakhare v. State of Maharashtra it was held as follows: (SCC p. 343, para 5):

"5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand

the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

The above position was highlighted in Ratansingh Dalsukhbhai Nayak v. State of Gujrat at SCC pp. 67-68, paras 6-7."

19. It is thus clear that the Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a

witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, or any other cause of same kind. A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto.

20. Let us now therefore, examine the oral evidence of the victim, P.W.2. P.W.2 states that the accused Liladhar inserted his finger in her vagina, due to which she was having pain in her vagina. Due to which, she sustained a bleeding injury to her vagina and she disclosed the incident to her grandmother. She states the person who inserted a finger in her vagina and anus, is Liladhar.

21. In her cross-examination, she denied the suggestions namely that Liladhar did not come to her home and her vagina and anus pressed by her grandmother by her finger and she sustained bleeding injury. She also denied the suggestion that she was deposing falsely, that accused Liladhar inserted his finger in her vagina, due to which, she was having pain in her vagina and she

sustained a bleeding injury to his vagina.

22. During the recording of the evidence, the accused was shown to the victim and she identified him. Hence, it cannot be said that the appellant was falsely implicated.

23. Moving to the next submission that, the Doctor at Public Health Center, who first examined the victim was not examined in corroboration and it is fatal.

24. It is therefore, necessary to examine whether there is any requirement of law to insist upon corroboration of the victim of a sexual assault to rest conviction of an accused.

25. In this regard it will be useful to refer to the judgment of the Hon'ble Supreme Court of India in the case of *Ranjit Hazarika Vs. State of Assam*², wherein the Hon'ble Supreme Court of India, has held thus:

“6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the

appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In it Singh, MANU/SC/0366 /1996: 1996CriLJ1728 to which one of us (Anand, J.) was a party, while dealing with this aspect observed:

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix

may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

26. From the above referred observations it is evident that the testimony of the victim of a sexual assault is vital and unless there are compelling reasons which necessitated looking for corroboration of victim's statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

27. There is no requirement of law to insist upon corroboration of victim's statement to face conviction of an accused. The evidence of a victim of sexual assault stands almost at a par with an evidence of an injured witness and to an extent is even more reliable. Hence, non examination of doctor at Primary Health Centre, who examined the victim first, is not fatal.

28. In the teeth of above referred well settled law though in this case at hand the victim's evidence is found to be credible and trustworthy and sufficient to rest conviction, let me also examine the evidence brought on record by the prosecution.

29. The prosecution has examined PW-5- Doctor, who is a practicing Gynecologist (MS) and was working at the relevant time at General Hospital, Bhandara as a Medical Officer and who

examined the victim when she was referred to General Hospital Bhandara.

30. The PW-5 in his oral testimony has stated that upon local examination of the victim's genital, on her labia majora there was redness and swelling. On the clitoris, there was redness. On the fourchette and introitus/vagina, there was redness. On the hymen, the injury was present. Edges of the hymen was swollen and red. Bleeding was not seen at that time. There is minimal edema. Position of Tear was 7 O'clock. There was no evidence of a perineal tear. Redness was present on the urethra. On anal examination, there was no evidence on the external injury of redness.

31. If chemical analyzers reports (Exhibit-58) are examined, it will be revealed that the nicker of the victim had stained with blood at the middle position and appeared to be washed.

32. Exhibit No.59 shows that the blood group of the victim is 'O'.

33. Exhibit No.60 shows sustained human blood group 'O' in the Nail of the accused which was collected.

34. Thus, the oral as well as medical evidence, is completely in harmony. Hence, it can safely be said that there is sufficient

evidence to establish the guilt of the accused beyond reasonable doubt.

35. The Hon'ble Supreme Court of India in the case of *Aman Kumar Vs. State of Haryana*,³ has held thus:

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See S.P. Kohli (Dr.), v. High Court of Punjab and Haryana. In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most

reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

8. The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section

511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”

36. From the above referred observations it becomes evident that penetration is the *sine qua non* for an offence of rape and it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Even partial or a slightest penetration in the labia majora or the vulva or pudendum with or without emission of semen is quite sufficient as labia majora is the first to be encountered by the male organ. Hence, the depth of penetration is immaterial in an offence punishable under Section 376 of the Indian Penal Code.

37. It is thus, safely be held that this is a case of penetrative sexual assault.

38. The submission of the appellant that there was a delay in lodging the report cannot be accepted, for the reason that the record

shows that the Police received the information on same day.

39. In the circumstances, there is no legal infirmity or error committed by the learned trial Court in convicting the accused.

Accordingly, I pass the following order:

- a) The criminal appeal is **dismissed**.
- b) Fees of the learned appointed counsel for respondent No.2 is quantified as per the Rules.

[ANIL S. KILOR, J.]

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